

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matters of)	
)	
UACC Midwest, d/b/a United Artists)	CC Docket No. 95-94
Cable Mississippi Gulf Coast)	
)	
Telecable Associates, Incorporated;)	
)	DOCKET FILE COPY ORIGINAL
Vicksburg Video, Inc.;)	
)	
Mississippi Cablevision, Inc.; and)	
)	
Mississippi Cable Television Association)	PA 91-0005 through
)	PA 91-0009
Complainants,)	
)	
v.)	
)	
Southwestern Public Service Company)	
)	
Respondent)	

To: The Honorable Joseph Chachkin, Administrative Law Judge

OPPOSITION TO MOTION TO ENLARGE ISSUES

The Chief, Common Carrier Bureau, through her attorneys, pursuant to Section 1.294(a) of the Commission's Rules, 47 C.F.R. § 1.294(a), hereby opposes the motion of BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company ("South Central Bell") to enlarge the issues in the captioned proceeding and requests that the motion be denied. In support of this opposition, the following comments are respectfully submitted.

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1. Pursuant to statutory language contained in Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. §224, the Commission adopted Section 1.1409(c) of its rules, 47 C.F.R. §1.1409(c), which defines the maximum allowable rate for pole attachments. The maximum allowable rate is generally calculated by multiplying the net cost of a bare pole by a usage space factor and the pole carrying charges. These carrying charges are the costs associated with owning and maintaining the poles and include components for income taxes, maintenance, administrative, and depreciation expenses as well as a return on pole investment. The Commission has specified the method for calculating these carrying charges including the regulatory accounts to be used. *Amendment of the Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order*, 2 FCC Rcd 4387 (1987) (*Pole Attachment Order*). Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul Glist, Esq., Cole, Raywid & Braverman, 5 FCC Rcd 3898 (1990) (*June 22 Letter*).

2. In this proceeding, the pleadings of the Complainants and the Respondent, South Central Bell, have narrowed the substantive issues to the methodologies for computing two of these carrying charge components: the component for maintenance expense and the component for administrative expense. In the *Hearing Designation Order* issued on June 15, 1995, the Common Carrier Bureau ("Bureau") resolved these issues and specified how the parties should compute the maintenance and administrative expense components to arrive at the maximum allowable rate that South Central Bell can charge the Complainants. (*Hearing Designation Order* at paras. 8-19.)

3. In its Motion to Enlarge Issues, South Central Bell disputes the Bureau's resolution of these issues in the *Hearing Designation Order* and seeks to reopen them at this time.

South Central Bell proposes alternate methods for calculating the maintenance and administrative expense components that would replace the methods prescribed by the Bureau. (Motion to Enlarge Issues - issue 1.) In addition, South Central Bell wants to offer alternate rate calculations that conflicts with the Commission's current methodology for calculating the maximum allowable pole attachment rate as set forth in the *Pole Attachment Order* and the *June 22 Letter*. (Motion to Enlarge Issues - issue 2.)

4. The Commission has held that, where there has been a thorough consideration of a particular question in a designation order, the administrative law judge ("ALJ") handling the proceeding is required, in absence of new facts or circumstances, to follow the judgement in the hearing designation order as the law of the case. *Fidelity Radio Inc.*, 1 FCC 2d 661 (1965); *Atlantic Broadcasting Co.*, 5 FCC 2d 717 (1966). As the Commission's Review Board stated in *Fort Collins Telecasters*, 103 FCC 2d 978, 983-84 (Rev. Bd. 1986):

It is "black-letter law" [that] "where there ha[s] been a thorough consideration of the particular question in the designation order," subordinate staff officials such as presiding hearing officials, or even the Board, may not reconsider the matter or take any action inconsistent with the designation order. *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720-721 (1966). This is so irrespective of whether the designation order is handed down by the full Commission or -- as here -- pursuant to a delegated staff authority acting in the name of the Commission. *Frank H. Yemn*, 39 RR 2d 1657 (1977).

5. The *Hearing Designation Order* in this proceeding presents a well-reasoned analysis and resolution of the questions involved in computing the maintenance and administrative expense components based on Commission actions. (*Hearing Designation Order* at paras. 9-11, 14-19.) Moreover, in its Motion to Enlarge, South Central Bell has not asserted that the Commission overlooked material facts in resolving these questions or that there are new

facts or circumstances warranting consideration of new issues. In view of this, South Central Bell's Motion to Enlarge issues should be denied.

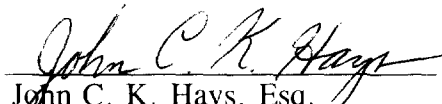
6. Moreover, to the extent that South Central Bell wants to promote a new methodology for computing the maximum allowable rate for pole attachments, a rulemaking, not an adjudicatory proceeding, would be the proper forum. *New York University*, 10 FCC 2d 53, 55 (Rev. Bd. 1967), review denied, FCC 68-609, released June 12, 1968. South Central Bell's motion to offer alternative rate calculations would involve broad legal and policy issues that cannot be resolved in the limited context of a designation order. See *Belo Broadcasting Corp.*, 47 FCC 2d 540, 544 (1974); *Beaufort County Broadcasting v. Federal Communication Commission*, 787 F. 2d 645, 654 n.7 (1986).

Respectfully submitted,

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July 27, 1995

By her attorneys :


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CERTIFICATE OF SERVICE

I, Ernestine Creech, hereby certify that I have, this 27th day of July, 1995, served a copy of the foregoing Notice of Appearance by First Class mail, postage prepaid, except as otherwise noted, on the following parties:

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